

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 12, 2006

ROBBY LYNN DAVIDSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Pickett County
No. 448 Leon C. Burns, Jr., Judge

No. M2005-02270-CCA-R3-PC - Filed December 4, 2006

A Pickett County jury convicted the Petitioner, Robby Lynn Davidson,¹ of two counts of second degree murder. The trial judge imposed two twenty-five year sentences to be served consecutively in the Department of Correction. On direct appeal, the Petitioner challenged both his convictions and his sentences, and this Court affirmed both. The Petitioner now requests post-conviction relief, alleging that he received the ineffective assistance of trial counsel and that the State committed prosecutorial misconduct. We conclude that the Petitioner is not entitled to relief based on ineffective assistance of counsel and that the Petitioner's claims of prosecutorial misconduct have been waived by failure to present them on direct appeal. Therefore, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Michael Savage, Livingston, Tennessee, for the appellant, Robby Lynn Davidson.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William E. Gibson, District Attorney General; and Owen Burnett, Assistant District Attorney General, for the appellant, State of Tennessee.

¹The Petitioner's name is also spelled "Robbie" Lynn Davidson in the case style of previous phases of the Petitioner's case and in various portions of the record. This Court will use the spelling from the "Amended Petition for Relief of Conviction and Service," which appears to be the earliest post-conviction pleading contained in the record. This Court notes that no initial petition for post-conviction relief, either pro se or through counsel, is included in the record. Further, the Petitioner's post-conviction attorney stated in the record that the proper spelling is "Robby" Lynn Davidson.

OPINION

Factual Background

The Petitioner appeals the denial of post-conviction relief relating to his convictions by a jury for two counts of second degree murder. This Court summarized the facts of the underlying offenses on direct appeal as follows:

On August 29, 1995, employees of the Pickett County Highway Department found a burned vehicle . . . [that] contained the skeletal remains of one male and one female. [The victims were identified by bone fragments as Ms. Lorraine Whittenburg and Mr. Bud Hill].

. . . .

The forensic anthropologists testified that intense heat had altered both remains and thus precluded positive determination of the causes of death. They could determine, however, that the male's body had been inverted, with his feet toward the rear of the vehicle. The female's head was in the floor of the passenger side. The position of the bodies would have allowed one to drive the vehicle with the bodies in the front seat. The male's skull had been shattered, whereas the female's was not. Expert testimony established that this shattering could have resulted from internal explosion due to extreme heat. This shattering was also consistent, however, with a gunshot wound to the head, and forensic examination identified beveling, consistent with bullet entry, on fragments of that particular skull. The examination also identified two radioplasties, or artifacts indicative of lead or other metal from a projectile entering the male's skull.

Witnesses established that both victims were with the [Petitioner] on August 27, 1995, the last day either victim was seen alive. . . . Bethel Ray Hill, Sr., the male victim's father, testified that the [Petitioner] purchased a 30-06 rifle, with some live cartridges, from Bud Hill at the Hill's residence earlier that day. . . .

Ricky Davidson, the [Petitioner's] young nephew, testified that on August 27, 1995, he was visiting his grandfather's home. While there, Ricky overheard the [Petitioner] and an unidentified man talking about a shooting. Ricky thought that the men were arguing. Later that night, after returning home, Ricky testified that he overheard his grandfather telling his father that he, the grandfather,

had heard two gunshots and that the [Petitioner] had apparently shot “at them people.” . . .

At a jury-out hearing, Cosby Davidson, the [Petitioner’s] father, told the judge, under oath, that he had no recollection of an October 11, 1995 interview with investigators. Cosby further failed to recall his preliminary hearing testimony on November 16, 1995. . . . The trial court allowed the state to play a videotape of the preliminary hearing. This videotape contained [the playing of] an audiotape of the October 11 interview. At the preliminary hearing, after hearing the tape, Cosby affirmed its contents.

In the audiotaped interview played for the jury, Cosby stated that the [Petitioner], a second man, and a woman were at Cosby’s residence on a Sunday night. Cosby stated that the killings took place near his residence and that he heard two shots. Cosby also said he went out on his porch and saw the [Petitioner] load the bodies in the car. During the interview, he identified the male victim as Bud Hill. Cosby then stated he went to Billy Davidson’s residence and told Billy about the shooting.

State v. Robbie Davidson, No. M1997-00130-CCA-R3-CD, 2000 WL 622256 (Tenn. Crim. App., Nashville, May 12, 2000).

At trial, the prosecutor made various statements in closing argument that the Petitioner asserts merit post-conviction relief. First, the prosecutor stated that the defense attorney “has the right to subpoena witnesses, and has the right to have them here, and they’re not here because they wouldn’t have been any more helpful to the defendant than they would have been to the State.” Second, the prosecutor commented on Lisa Davidson’s credibility and her possible biases as follows:

Now, I want you to think, ladies and gentlemen, in talking about Ms. Davidson’s placing and looking at her credibility, she’s been here to do everything she can to help [Robby] Davidson; and that’s what she is trying to do. She’s trying to do anything she can to help get [Robby] Davidson off. She’s gotten up here before, and she admitted to you that she testified at an earlier hearing to try and get this case dragged to a different county, and she got up on the witness stand and said [Robby] Davidson could never get a fair trial in Pickett County. Pickett County jurors would not be fair. And I think, that’s a lack of trust that she has and maybe others on the defense have in the Pickett County jury, and I think [it’s] not respectful to the

character and integrity of this jury to be making those kind of allegations.

Third, the prosecutor stated in closing argument as follows:

[I]t would take a terrible person to do something like this. And we all like to think that no one anywhere in this country would ever be capable of shooting two people, burning their bodies, and committing a killing like that; but someone's done it . . . since we know that someone's done it . . . [a]sk yourself who in Pickett County is capable of doing this.

At the post-conviction hearing, Oleta Neal Betty testified that she had serious concerns about Cosby Davidson's memory after an incident where she came upon him lost and disoriented walking around town. Lisa Davidson, Cosby Davidson's daughter, also testified that she had serious concerns about his memory.

Three neighbors of Cosby Davidson—Dewey Williams, Mae Williams, and Ilene West—also testified at the post-conviction hearing. These three individuals lived near the Davidson residence, and all said that they would have been able to hear gunshots if any were fired on the Davidson property. None of these neighbors recalled hearing anything on the night of the murders; however, none of these neighbors could definitively state whether they were at home at the time the murders occurred.

Special Agent Larry O'Rear read a Tennessee Bureau of Investigation file at the post-conviction hearing that stated that “[a]round eighteen . . . different casts of footprints and tire tracks . . . were taken” at the scene. Special Agent O'Rear then read a note in the Tennessee Bureau of Investigation file that stated that the crime-scene team “[p]rocessed [the] area for shoe and tire tracks. . . . [and] eliminat[ed] all prints . . . arriving after the fire.” Special Agent O'Rear stated that he had no personal knowledge of any taking of prints from the crime scene because he did not arrive until several days later and, therefore, he is “the wrong person” to ask about the existence and examination of any casts. Special Agent O'Rear stated that he did not know for certain whether the initial crime-scene investigators actually “eliminated everyone there” after the fire occurred. Special Agent O'Rear testified that the Defendant's trial attorney never asked about these tire- or shoe-print casts.

Procedural Background

After being convicted of two counts of second degree murder and having his convictions and sentences affirmed on direct appeal, the Petitioner appears to have timely filed a pro se petition for post-conviction relief; however, the pro se petition is not contained in the record on appeal. On April 10, 2003, the Petitioner through counsel filed an amended petition for post-conviction relief. The

post-conviction hearing was held on August 24, 2005, and post-conviction relief was denied by the trial court on October 14, 2005. This appeal followed.

I. Ineffective Assistance of Counsel

First, the Petitioner argues that the trial court erred in determining that he received the effective assistance of counsel at trial. The Petitioner asserts that his trial attorney (1) failed to investigate the State's key witness's mental health, (2) failed to interview neighbors near the crime scene, (3) failed to properly investigate tire- and shoe-print evidence from the crime scene, and (4) failed to object to the prosecutor's improper closing argument. We conclude that the trial court properly found that the Petitioner received the effective assistance of counsel.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the petitioner the right to representation by counsel at trial. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the petitioner's lawyer and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The petitioner bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The petitioner's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de

novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id.

(1) Failure to Investigate State’s Witness’s Mental Health

First, the Petitioner alleges that he received the ineffective assistance of counsel because his trial attorney did not thoroughly inform the jury of memory-related health issues of the State’s key witness, Mr. Cosby Davidson, who was eighty-one years old at the time of the murders. The State asserts that trial counsel rendered the effective assistance of counsel by presenting evidence to the jury of Cosby Davidson’s health issues. The trial court found that the Petitioner failed to prove deficient performance by his trial counsel. We agree.

At trial, defense counsel did question Cosby Davidson’s daughter, Lisa Davidson, about his health and memory issues. Lisa Davidson testified that her father suffered from “skin cancer” and that “[h]is memory is bad.” Lisa Davidson stated that Cosby Davidson “gets mixed up and confused” and that his memory problems were pretty severe around the time of the murders. Lisa Davidson stated that, on one occasion, Cosby Davidson was “in town” and became “so confused, he didn’t even know where he was at.” Lisa Davidson stated that she noticed Cosby Davidson becoming confused about what people had told him, and that “if someone would tell him something[,] he would be likely to believe it . . . until somebody told him otherwise.”

Accordingly, the trial court found at the post-conviction hearing that “Cosby Davidson’s state of mind was called into question by Lisa Davidson’s testimony.” However, the jury chose to give greater weight to the State’s case, which included the corroborating testimony of Ricky Davidson. Thus, the trial counsel’s performance was not shown to be deficient because he clearly presented the jury with questions regarding Mr. Cosby Davidson’s memory; however, the jury chose to accredit the testimony presented by the State to convict the Petitioner. Therefore, we conclude the Petitioner is not entitled to relief on this issue.

(2) Failure to Inspect Tire - and Shoe - Print Evidence

Second, the Petitioner alleges that he received the ineffective assistance of counsel because his trial attorney failed to inspect tire- and shoe-print casts from the crime scene. The Petitioner asserts that the cast evidence, which has now been destroyed, may have created reasonable doubt because the Petitioner’s shoe prints and his vehicle’s tire prints were not present at the crime scene. The State asserts that the Petitioner “presented no evidence that in any way would show that inconclusive casts of tire tracks and shoe prints from the scene of the crime would have produced a different result or that trial counsel erred in not pursuing such analysis.” We conclude that the Petitioner did not receive the ineffective assistance of counsel because the lack of cast evidence did not prejudice the Petitioner in light of the evidence of guilt.

Our supreme court has considered the constitutional implications that may arise from “destroyed evidence.” State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999). In the context of the Sixth Amendment guarantee to the effective assistance of counsel, this Court has held that the Petitioner may be deemed to have received the effective assistance of counsel even if the State has destroyed evidence if “‘overwhelming’ evidence . . . supported his conviction.” James Thomas Jefferson v. State, No. M2003-01422-CCA-R3-PC, 2005 WL 366981, at *4 (Tenn. Crim. App., Nashville, Feb. 16, 2005). This principle is based on the Strickland standard that the Petitioner’s representation is constitutionally adequate unless the attorney’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686.

In this case, the jury was presented with substantial direct evidence of guilt in Cosby Davidson’s statements and Ricky Davidson’s statements. Cosby Davidson stated in his pre-trial interview that he heard gunshots outside his residence and then saw the Petitioner loading the bodies into a vehicle. Ricky Davidson testified that he overheard his grandfather discussing a shooting on the night of the murders. The jury also heard forensic evidence that the bodies were both positioned in the passenger seat of a car, which would have enabled an individual to drive the car to another location to dispose of the bodies. The bodies were then found away from Cosby Davidson’s residence in a burned and destroyed car registered to the victim’s father. The male victim’s skull showed signs of a gunshot wound to the head; the other portions of both bodies were badly destroyed, and no further gunshot evidence was conclusively shown, although it possibly was inflicted. Finally, the victims were last known to be alive in the Petitioner’s presence at Mr. Cosby Davidson’s home.

In our view, the failure to produce further crime-scene evidence that may or may not have shown other shoe prints or tire prints does not demonstrate ineffective assistance of counsel. While the eighteen casts may have been shown to have some other shoe prints that did not match the Petitioner or the rescue workers arriving after the fire, this would merely demonstrate that other people or vehicles had been at the location before the fire. The existence of other shoe prints or tire prints before the fire would not be surprising, and it certainly is not the sort of exculpatory evidence that would cause this Court to conclude that the jury would have likely reached a contrary result in light of this evidence. Thus, we conclude that the Petitioner failed to show that he received the ineffective assistance of counsel with regard to this issue.

(3) Failure to Interview Neighbors

Third, the Petitioner argues that he received the ineffective assistance of counsel because his trial counsel did not interview neighbors living near the crime scene to determine if their testimony would assist in his defense. The Petitioner asserts that these witnesses would have testified that they did not hear gunshots on the night of the murders. The State asserts that the Petitioner failed to present any evidence to the post-conviction court that any neighbors were indeed at home on the night of the murders, much less that anything they did or did not hear would have probably affected the outcome of the trial. We agree with the State that the Petitioner did not demonstrate that he

received the ineffective assistance of counsel by the failure of his trial counsel to present the testimony of neighbors to the jury.

At trial, the Petitioner's attorney presented evidence that "at least five" neighbors lived in the "immediate vicinity" of Mr. Cosby Davidson's residence. Further, the Petitioner's attorney elicited testimony from Ms. Lisa Davidson, who lived at Mr. Cosby Davidson's residence, that she was home on the night of the murders and did not hear any noises, even though from inside the home she usually could hear talking and other noises coming from the outside and even though she was a "light sleeper." Therefore, the Petitioner's attorney did present evidence to the jury that contradicted Mr. Cosby Davidson's statement that the Petitioner shot the victims in the driveway. However, the jury ultimately chose not to accept this version of events.

The trial court found that trial counsel's representation in this regard was not deficient because his conduct was not below that of a reasonable attorney. Further, even if the representation were to be deemed deficient, the trial court found that the Petitioner did not establish that he was prejudiced by the lack of the neighbors testifying at his trial. In fact, all of the neighbors that testified at the post-conviction hearing were uncertain as to whether they were even home on the evening in question. Therefore, the Petitioner was unable to show the requisite prejudice even if his attorney's performance was deemed deficient. The evidence does not preponderate against the trial court's finding that the Petitioner received the effective assistance of counsel with regards to this issue.

(4) Failure to Object to Prosecutor's Closing Argument

Fourth, the Petitioner asserts that he received the ineffective assistance of counsel because his trial attorney did not object to improper statements in the prosecutor's closing argument.² We conclude that the Petitioner is not entitled to relief on this issue.

This Court has considered whether the failure to object during a closing argument is generally sufficient for a showing of ineffective assistance of counsel. Gregory Paul Lance v. State, No. M2005-01675-CCA-R3-PC, 2006 WL 2380619 (Tenn. Crim. App., Nashville, Aug. 16, 2006). In Lance this Court held as follows:

Because the reviewing court must indulge a strong presumption that the conduct falls within the range of reasonable professional assistance and may not second-guess the tactical and strategic choices made by counsel unless those choices were uninformed by inadequate preparation, it is highly unlikely that appellate counsel could have succeeded in meeting either the deficiency or the prejudice prong of

²The State did not address this precise issue. This claim was not raised as a separate claim of ineffective assistance of counsel in that portion of the Petitioner's brief, but instead the issue was included in the Petitioner's argument regarding prosecutorial misconduct. We nonetheless address the Petitioner's issue of the failure to object to the closing argument because it is clearly worded as an ineffective assistance of counsel claim coupled with a prosecutorial misconduct claim.

the ineffective assistance of counsel claim based on trial counsel's failure to object to the improper closing argument.

Id. at *6 (citations omitted); see Strickland, 466 U.S. at 690; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1992).

This Court approaches the present case under the same legal framework. The decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions. As the Lance Court noted, attorneys may often choose not to object to damaging evidence for strategic reasons, such as "to avoid emphasizing [the unfavorable evidence] to the jury." Lance, 2006 WL 2380619, at *6. The trial court found that the statements which the Petitioner challenged as improper argument were not properly objectionable. The trial court also found that prejudice had not been shown. This Court agrees that the failure to object to the closing argument in this case does not constitute constitutionally deficient performance, and the Petitioner received the effective assistance of counsel with regard to this issue. Furthermore, we are constrained to note that it appears from the record that trial counsel did object to portions of the State's closing argument, including one of the challenged segments, and that the trial court overruled the objection. Any error in this regard would be deemed harmless; thus, the Petitioner has failed to establish prejudice.

II. Prosecutorial Misconduct

The Petitioner also asserts that the State committed prosecutorial misconduct by making three statements during closing argument that the Petitioner would assert were "improper." First, the Petitioner asserts that the prosecutor "intentionally misled the jury in implying that the burden of proof was on the [Petitioner] and the jurors could infer that the [Petitioner's] failure to call certain witnesses implies that he is guilty." Second, the Petitioner asserts that the prosecutor "made the jury believe it was proper to draw an inference that the witness was not credible simply because she believed that the [Petitioner] could not get a fair trial in Pickett County." Third, the Petitioner asserts that the prosecutor asked the jury to infer that "the perpetrator must have been from Pickett County and . . . that the [Petitioner] was the only person in Pickett County capable of committing such a crime." The State contends that these claims were all waived because they were not properly raised prior to the petition for post-conviction relief. We agree with the State and conclude that the claims of prosecutorial misconduct are waived.

Tennessee Code Annotated section 40-30-106(g) states as follows:

A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless: (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application

of that right; or (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann. § 40-30-106(g). This Court has previously held that “issues [of prosecutorial misconduct] are more properly the subject of a direct appeal and are not properly issues for post-conviction relief.” John C. Johnson v. State, No. M2004-02675-CC-R3-CO, 2006 WL 721300, at *19 (Tenn. Crim. App., Nashville, Mar. 22. 2006).

In this case, the Petitioner had the opportunity to present the claims of prosecutorial misconduct on direct appeal. The Petitioner did not do so. Therefore, the Petitioner has waived any claim on post-conviction review regarding whether the prosecutor’s comments were constitutionally improper. The Petitioner is not entitled to relief on this issue.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

DAVID H. WELLES, JUDGE